

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Robert G. Taub

South Valley Station Post Office
Yerington, Nevada

Docket No. A2012-108

ORDER DENYING MOTION TO STRIKE
AND GRANTING SUMMARY JUDGEMENT IN PART

(Issued April 11, 2012)

By motion dated March 20, 2012, the United States Postal Service (Postal Service) requests that the Commission strike the reply comments filed in this proceeding by the Public Representative on March 9, 2012.¹ On March 27, 2012, the Public Representative filed an opposition to the Motion to Strike.² For the reasons given below, the Motion to Strike is denied.

¹ Motion by the United States Postal Service to Strike Reply Comments of Public Representative, March 20, 2012 (Motion to Strike). On April 4, 2012, the Postal Service filed a corrected version of page 9 of its Motion to Strike. Notice of Errata to United States Postal Service Motion to Strike Filed March 20, 2012 (Notice of Errata). As discussed herein, the Motion to Strike includes the changes made by the Notice of Errata.

² Opposition of the Public Representative to United States Postal Service Motion to Strike, March 27, 2012 (PR Opposition).

I. BACKGROUND

These proceedings commenced on January 19, 2012, and involve review of the Postal Service's Final Determination to close the South Valley Station post office in Yerington, Nevada (South Valley Station).³ One of the petitioners seeking review is the postmaster of the main Yerington, Nevada post office, Lisa Smith (Petitioner Smith).⁴ As it does in all review proceedings conducted under 39 U.S.C. 404(d)(5), the Commission appointed a Public Representative to represent the interests of the general public. Order No. 1147 at 3. On March 9, 2012, the Public Representative filed comments⁵ responding to arguments previously made by the Postal Service in support of its Final Determination.⁶

II. THE MOTION TO STRIKE AND PUBLIC REPRESENTATIVE ANSWER

The Postal Service bases its Motion to Strike on four grounds: (1) the Public Representative's comments should not be considered because they are based upon information obtained from direct contact between the Public Representative and Postal Service employees (Motion to Strike at 3-7); (2) the Public Representative's comments are based upon incorrect statements concerning the applicability of certain Federal regulations to the main Yerington post office (*id.* at 7-10); (3) the Public

³ Notice and Order Accepting Appeal and Establishing Procedural Schedule, January 19, 2012 (Order No. 1147).

⁴ Petition for Review received from Lisa Smith regarding the South Valley Station, Yerington, Nevada post office 89447, January 10, 2012 (Smith Petition).

⁵ Public Representative Reply Comments, March 9, 2012 (PR Reply Comments). The PR Reply Comments were accompanied by a motion for late acceptance of those comments. The motion is granted.

⁶ Comments of the United States Postal Service, February 21, 2012. On March 6, 2012, the Postal Service filed a Notice of Errata to Comments of United States Postal Service Filed February 21, 2012, together with a corrected version of its comments (Revised Postal Service Comments). On March 27, 2012, the Public Representative requested leave to submit supplemental comments. Motion for Acceptance of Supplemental Comments, March 27, 2012 (PR Motion). The Public Representative's proposed supplemental comments were filed on March 28, 2012 (PR Supplemental Comments). The Commission will address both the PR Motion and the PR Supplemental Comments in a future order.

Representative's comments do not concern the record on review (*id.* at 10-12); and (4) the Commission is barred from considering post-record evidence (*id.* at 13).

The Public Representative's answer to the Postal Service states five grounds for opposition. Those grounds are discussed in the analysis that follows.

III. ANALYSIS

A. Public Representative Contacts With Postal Service Employees

The Postal Service takes the position that the Public Representative's comments should be stricken because they are based upon communications with Postal Service employees "which were not in accordance with either the Mission Statement of the Office of the Consumer Advocate or Rule 4.2 of the American Bar Association Model Rules of Professional Conduct." Motion to Strike at 7.

As the Postal Service itself acknowledges, the Office of Consumer Advocate no longer exists. *Id.* at 3. Instead, the Commission now appoints individuals on a case-by-case basis to serve as officers of the Commission to advocate the interests of the general public. These officers are referred to commonly as Public Representatives. Although the rules applicable to the former Office of Consumer Advocate remain in the Code of Federal Regulations, they do not technically apply to the activities of Public Representatives.

Even if the rules formerly applicable to the Office of Consumer Advocate were deemed applicable to Public Representatives, the question would remain as to what "means and procedures [would be] available [to Public Representatives] under the Commission's rules and applicable law to present evidence and arguments on behalf of consumers in Commission proceedings."⁷ The Postal Service argues that the available "means and procedures" for presenting evidence and arguments in Commission

⁷ 39 CFR Part 3002, Appendix A, Postal Regulatory Commission, Mission Statement of the Office of the Consumer Advocate at ¶ 3.

proceedings are subject to the limitations set forth in the American Bar Association Model Rules of Professional Conduct (ABA Model Rules). Motion to Strike at 4. Such limitations, the Postal Service asserts, should apply not only to attorneys serving as Public Representatives, but also, by analogy, to non-attorney Public Representatives.

Id. The Postal Service argues that the ABA Model Rules would prohibit communications between Public Representatives and Postal Service employees without the consent of Postal Service counsel (or some other legal or judicial authorization). *Id.* at 5.

The Public Representative presents a three-pronged response. First, she argues that professional rules of conduct for lawyers do not apply to non-lawyers like the Public Representative who filed the comments at issue. PR Opposition at 4. Second, she argues that even if the professional rules of conduct for lawyers did apply to non-lawyers, it is the District of Columbia's Rules of Professional Conduct, not the ABA Model Rules, that should apply. *Id.* at 4-7. Third, the Public Representative asserts that it is the Postal Service's responsibility for advising its employees of any policy it has regarding communications with Public Representatives in Commission proceedings. *Id.* at 7.

The Public Representative is, in general, correct that professional rules of conduct for attorneys do not apply to non-lawyers.⁸ However, rule 6(d) of the Commission's rules of practice provides that "[i]ndividuals practicing before the Commission shall conform to the standards of ethical conduct required of practitioners in the courts of the United States." 39 CFR 3001.6(d). By using the term "individuals", a more inclusive term than "attorneys", rule 6(d) makes ethical standards in Commission proceedings applicable to classes which include both lawyers and non-lawyers. See

⁸ In situations such as those in which a non-lawyer works under the supervision and control of an attorney, limitations on communications with employees of an adversarial party would apply to non-lawyers as well. See D.C. Bar Op. 129 at 2 (1983) (duty of attorney's agent to disclose his identity and the fact that he represents an adverse party); ABA Informal Op. 581 (1962) (duty of defense attorney's investigator to inform witness of fact he works for defense).

rule 6(a) (identifying attorneys and other classes of persons as eligible representatives of participants in Commission proceedings).

Since passage of the Postal Accountability and Enhancement Act, Pub L. 109-435, 120 Stat. 3219 December 20, 2006, the Commission has routinely appointed non-attorneys to serve as Public Representatives. The mere happenstance that a Public Representative appointed by the Commission is not an attorney should not allow the Public Representative to engage in conduct without ethical limits. To permit that would be to risk denial of due process to the Postal Service and other participants in Commission proceedings. Such a result is precluded by rule 6(d) of the rules of practice.

Rule 6(d) has previously been applied in Docket No. C2008-3, Complaint of Capital One Services, Inc., a case cited by the Public Representative. PR Opposition at 5. In that proceeding, the Presiding Officer ruled that “[s]ince the Commission is located in the District of Columbia, attorneys practicing in front of the Commission must follow the current D.C. Rules of Professional Conduct.”⁹ The Commission agrees with that ruling. It is consistent with both the ABA Model Rules relied upon by the Postal Service,¹⁰ as well as by the D.C. Rules of Professional Conduct (D.C. Rules of Conduct) relied upon by the Public Representative.¹¹ Since the Commission conducts its review proceedings in Washington, D.C., the D.C. Rules of Professional Conduct apply.

⁹ Docket No. C2008-3, P.O. Ruling No. C2008-3/31, Presiding Officer’s Ruling Denying Motion of Bank of America Corporation to Limit the Scope of This Proceeding or Disqualify Counsel, October 31, 2008. The Presiding Officer’s application of rule 6(d) to attorneys practicing before the Commission, as opposed to the broader class of “individuals”, can be explained by the fact that the issue presented to the Presiding Officer in Docket No. C2008-3 involved an attorney.

¹⁰ Rule 8.5 of the ABA Model Rules provides in relevant part as follows: “(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise....”

¹¹ Rule 8.5 of the D.C. Rules of Professional Conduct provides in relevant part as follows: “(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise....”

The distinction between the D.C. Rules of Conduct and the ABA Model Rules is critical in this case. Although the D.C. Rules of Conduct are based upon the ABA Model Rules, some of the model rules were modified in significant respects before their adoption.¹² Of particular importance are the revisions made to ABA Model Rule 4.2 relied upon by the Postal Service in this proceeding.

As adopted by the American Bar Association, Model Rule 4.2 strictly prohibits an attorney from communicating “about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” Comment [7] to ABA Model Rule 4.2 explains that Rule 4.2’s prohibition on communications extends to an employee of an organization represented by an attorney if the employee “supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability....”

ABA Model Rule 4.2 would have prohibited the Public Representative from communicating with a broad range of Postal Service employees, unless specifically authorized by Postal Service counsel.¹³ However, ABA Model Rule 4.2 was changed significantly before its adoption as part of the D.C. Rules of Conduct. As the Public Representative points out, Rule 4.2 of the D.C. Rules of Conduct states that “[d]uring the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of an organization without obtaining the consent of that organization’s lawyer.” PR Opposition at 5 citing Rule 4.2 of the D.C. Rules of Professional Conduct. In other words, as adopted in the District of Columbia, Rule 4.2 removes the fairly broad prohibition that ABA Model Rule 4.2 would

¹² Preface to the District of Columbia Rules, D.C. Rules of Professional Conduct at vii (1991).

¹³ A possible exception, acknowledged by the Postal Service itself, would be the postmaster of the main Yerington, Nevada post office, because she is the petitioner in this case. See Motion to Strike at 5 n.14.

have otherwise imposed on the Public Representative's communications with Postal Service employees. Accordingly, the Public Representative's communications in this proceeding with Postal Service employees did not, by their mere occurrence, constitute violations of Rule 4.2 of the D.C. Rules of Conduct.

While Rule 4.2 of the D.C. Rules of Conduct does not bar all communications between a lawyer and non-party employees of an opposing party, neither does it provide *carte blanche* to initiate or participate in such communications. For example, Rule 4.2 bars communications with non-party employees who have the authority to bind the opposing party. See Comment [4] to Rule 4.2; D.C. Bar Op. 287 (1998).¹⁴ Also, before communicating with a non-party employee, Rule 4.2 requires the lawyer to disclose his identity and the fact that he represents a party with an interest adverse to that of the employer. Comment [3] to Rule 4.2. In addition, Rule 4.2 prohibits a lawyer from soliciting information that is reasonably known or which reasonably should be known to be privileged, or protected from disclosure by statute or established evidentiary privilege. D.C. Bar Op. 287 (1998). Moreover, in communicating with the employee, the lawyer must be truthful in statements to others and must not knowingly make false statements of material facts or law. Rule 4.1 of the D.C. Rules of Conduct.

Applying the foregoing limitations and requirements to the facts presented here, the Commission concludes that the Postal Service support for its motion to strike is unpersuasive. The postmaster with whom the Public Representative communicated is one of the petitioners in this case. The Postal Service itself expressly refrains from alleging that it is *per se* improper for a Public Representative to communicate with a petitioner who is also the local postmaster. See Motion to Strike at 5 n.14. And, while the Postal Service does suggest that contact between the Public Representative and

¹⁴ For an employee to "bind" an organization in a litigation context, the employee must "have the authority to bind the organization with respect to the pending litigation." D.C. Bar Op. 129 (1983). The possibility that an employee might "bind" the organization by making a damaging omission or by disclosing prejudicial facts, would not, by themselves, bar communications between a lawyer and that employee. *Id.*; D.C. Bar Op. 287 (1998).

other Postal Service employees is subject to a blanket prohibition, the Commission has rejected that suggestion for the reasons stated above.

Second, while it is unclear exactly which Postal Service employees, other than the postmaster, were contacted by the Public Representative, there is no evidence that any of these other employees have authority to bind the Postal Service in its conduct of the review proceeding.¹⁵

Third, there is no evidence to suggest that the Public Representative failed to identify who she was, her role in the review proceeding, or the fact that she was taking a position adverse to that of the Postal Service.

Fourth, there is no suggestion that the Public Representative attempted to obtain, or did in fact obtain, privileged or confidential Postal Service information. Indeed, it appears that, in many cases, the Public Representative sought to confirm the accuracy and reliability of information that had been presented by the postmaster who had petitioned for review. See, e.g., PR Reply Comments at 3 n.6 and accompanying text (PR contact with Postal Service employees to confirm statements made in the Smith Petition). Finally, there has been no suggestion that the Public Representative was anything but truthful in dealing with the Postal Service's employees.

B. The Public Representative's Reliance Upon the Americans With Disabilities Act and Upon Extra-Record and Post-Record Information

Reliance upon the Americans with Disabilities Act. As a further ground for striking the Public Representative's comments, the Postal Service argues that the Americans with Disabilities Act of 1990 (ADA) and supporting regulations relied upon by the Public Representative are simply inapplicable. Motion to Strike at 7-10. The Public Representative responds by arguing generally that "the Postal Service is wrong in its interpretation of the law and facts" and that differences in the interpretation of the law

¹⁵ In this connection, see n.14, *supra*.

and the facts are not a proper basis for striking the Public Representative's comments. PR Opposition at 8-9.

The Postal Service asserts that it is not subject to the ADA because of its status under 39 U.S.C. § 201 as “an independent establishment of the executive branch of the Government of the United States.” Motion to Strike at 8. It contends further that the inapplicability of the ADA is consistent with its exclusion from the coverage of other federal laws. *Id.* A review of relevant provisions of the ADA provides support for the Postal Service's position. Subchapter I of the ADA applies to employment. Coverage extends to “employers”, which are defined in 42 U.S.C. § 12111(5)(B)(i) to exclude “the United States, [and] a corporation wholly owned by the government of the United States....”¹⁶ Subchapter II of the ADA applies to certain activities and actions of a “public entity.” The term “public entity” is defined to include only state or local governments or instrumentalities, the National Railroad Passenger Corporation, and any commuter authority. 42 U.S.C. § 12131(1).¹⁷ Finally, subchapter III of the ADA applies to public accommodations and services operated by private entities. The Postal Service is, of course, not a private entity. Motion to Strike at 8.

In light of the foregoing, and in the absence of a specific showing by the Public Representative to the contrary, the Commission concludes that the Postal Service is not subject to the ADA.

Having decided that the ADA does not apply, the Commission must next consider which portions, if any, of the Public Representative's comments should be stricken. The Commission concludes that striking portions of the Public Representative's comments would not be appropriate under the particular

¹⁶ The exclusion of the Postal Service from subchapter I has also been judicially recognized. *Venter v. Potter*, 694 F.Supp.2d 412 (W.D. Pa. 2010), *aff'd*, 435 Fed. Appx. 92, 2011 WL 2134368 (3d Cir. 2011).

¹⁷ Several courts have recognized that subchapter II does not apply to the federal government. See *Isle Royale Boaters Assn. v. Norton*, 154 F.Supp.2d 1098, *aff'd*, 330 F.3d 777 (6th Cir. 2003) (inapplicability of subchapter II to the National Park Service); and *Zingber v. Yacavone*, 30 F.Supp.2d 446 (D. Vt. 1997), *aff'd*, 163 F.3d 1015 (2d Cir. 1999) (inapplicability of subchapter II to the U.S. Department of Education and Secretary of Education).

circumstances here. While the Postal Service has successfully argued that the ADA does not apply, it has candidly admitted that it is subject to other statutes intended to protect persons with disabilities. Motion to Strike at 8-9. Those statutes are the Architectural Barriers Act, 42 U.S.C. §§ 4151, *et seq.*, and the Rehabilitation Act, 29 U.S.C. §§ 701, *et seq.* Whether those statutes apply may, of course, depend upon the specific facts and circumstances presented in a given case.

In light of the acknowledgment by the Postal Service that it is covered by these other statutes, it is prudent for the Commission not to strike portions of the Public Representative's comments which could be relevant to implications for this proceeding, if any, of those other statutes. The Postal Service is, however, entitled to a ruling on the Public Representative's assertions regarding the applicability of the ADA to the Postal Service. Accordingly, the Commission will treat the Motion to Strike with respect to the applicability of the ADA to this proceeding as a motion for partial summary judgment, and will grant that motion as to contentions related to the ADA. The implications for this proceeding, if any, of the Architectural Barriers Act and the Rehabilitation Act will be considered in the Commission's final ruling.

Reliance upon extra-record and post-record evidence. The Postal Service argues that the Public Representative seeks to supply and rely upon information which is not part of the record. Motion to Strike at 10-13. The Postal Service asserts that at least some of this information was improperly obtained from Postal Service employees. *Id.* at 10-12. The Public Representative responds by asserting that her arguments made in her comments regarding material deficiencies in the record are not the proper subject of a motion to strike. While the Postal Service is correct in pointing out that the Commission has on a number of occasions reminded participants that review proceedings are limited to a review of the record developed by the Postal Service during its administrative proceedings, participants frequently do seek to rely upon extra-record and post-record information. This is perhaps to be expected given the fact that many participants in review proceedings are non-lawyers. Nevertheless, as the Commission has repeatedly stated, its review of post office closings and consolidations must be

based upon the Administrative Record developed by the Postal Service. Given the statutory time limitations on review proceedings, the Commission finds it most appropriate to consider whether purported statements of fact are properly part of the Administrative Record in its rulings on the merits of appeals and not by means of rulings on motions to strike.

IV. CONCLUSION

For the reasons set forth above, the Postal Service's motion to strike the reply comments of the Public Representative is denied. With respect to the issue regarding the applicability of the Americans with Disabilities Act to the Postal Service, the Postal Service's motion to strike will be treated as a motion for partial summary judgment that the Americans with Disabilities Act is inapplicable and, as such, is granted.

It is ordered:

1. The motion by the United States Postal Service to strike the reply comments of the Public Representative is denied; and
2. Summary judgment on the issue of whether the Americans with Disabilities Act applies to the Postal Service is granted in favor of the Postal Service.

By the Commission.

Shoshana M. Grove
Secretary

Commissioner Taub dissenting.